

ANALYTICAL STUDY OF THE INTERACTION BETWEEN *FATĀWĀ*, SHARĪ'AH RULINGS, RESOLUTIONS AND CONVENTIONAL LAWS IN CONTEMPORARY ISLAMIC FINANCE IN MALAYSIA WITH CROSS REFERENCE TO THE PRACTICES IN SAUDI ARABIA, PAKISTAN AND THE SUDAN*

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INTRODUCTION

A sound legal framework is vital for the establishment of resilient financial institutions and markets. The Shari'ah and conventional systems offer their own frameworks for Islamic finance governance and financial contracts implementation. The legal framework for contemporary Islamic finance in Malaysia includes *fatāwā*, Shari'ah rulings, resolutions and conventional laws. All these play important roles in shaping the development of Islamic finance. Indeed, the Shari'ah and legal frameworks are paramount to ensure the sustainable development of Islamic finance and give due protection to consumers in Islamic finance (Aziz, 2007). In other words, it is important for a state to preserve equal justice for the citizen and to protect Islamic finance customers, in order to achieve the goals of Shari'ah.

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RESEARCH PROBLEM AND OBJECTIVES

In reality, Shari'ah has not been fully practised and has lost touch with most realities, except in the case of *'ibādāt* and family matters. Business and finance have been entirely referred to the so-called modern laws and legislation borrowed from outside Muslim civilisation (Azam, 2007). Islamic commercial law that regulates Islamic financial institutions and markets does not exist in many countries. A sound legislative framework for Islamic finance shall define the conduct of *fatwā*-issuing bodies, Shari'ah advisory bodies, executive governmental functionaries and dispute settlement agencies. In fact, the legal framework that regulates Islamic finance is complex (Faruq, 2010) and chaotic (Yaakob, 2010). The relationships between international *fatwā*-issuing bodies on Islamic finance *fatwā* is in divergence (Hashim, 2008).

Despite this, it seems that the *fatāwā*, Shari'ah rulings, resolutions and conventional laws in contemporary Islamic finance are not in congruence with each other under the present legal framework. This can be seen in the pronouncement of Justice Taqi Uthmani on the prohibitions of bank interest and the validity of *ṣukūk muḍhārabah* and *ṣukūk mushārahah*, as well as the decided cases of *Kuwait Investment Dar (TID) on ṣukūk mushārahah*, *International Investment Group (IIG) on ṣukūk muḍhārabah* and the case of *Re East Cameron Sukuk Partners L.P. [2008] Bankr, LEXIS 3918*.

On top of that, we can see that the court held that *bay' bithāman ājil* is still valid in the case of *Bank Islam Malaysia Berhad v. Lim Kok Hoe & Anor and Others Appeals (2009) 6 CLJ / [2009] 6 MLJ 2009* even though it does not fulfill the element of *qabḍ* under Islamic *mu'malāt*. In the case of *Beximco Pharmaceutical v. Shamil Bank of Bahrain EC E.C [2004] EWCA Civ 19*, the court held that the transactions are valid under common law even though they do not fulfill the Shari'ah requirement under Shari'ah law.

The application of Islamic finance resolutions is also not clear in civil courts. This can be seen in the case of *Affin Bank Berhad v. Zulkifli Bin Abdullah [2006] 1 CLJ 438* and the case of *Arab-Malaysian Finance Berhad v. Taman Ihsan Jaya & Ors, Koperasi Seri Kota Bukit Cherakah Bhd (Third Party) and other cases [2009] 1 CLJ 419 / [2008] 5 MLJ 631*. In fact, Shari'ah is not compatible

with the conventional framework (al-Salami, 2008). Making civil laws as references for Islamic finance is based on necessity (Suhaimi, 2010). All this suggests that there is incongruence in the interaction under the present legal framework.

Much literature has centred on *fatwā* governance (Md Nor, 2010). At the Closed Roundtable Discussion at the Inaugural SC-OCIS Forum in 2010, Elgari (2010) claimed that: *"a fatwā is not obligatory or legally binding. Yet the public at large wants a resolution issued by such a body to be applicable to the Islamic finance institutions and ought to be followed"*. Nevertheless, Laldin (2010) preferred to have harmonisation of Shari'ah interpretations and practices and looked forward to the introduction of guidelines to regulate Shari'ah services in Malaysia. Bakar (2010) agreed with this and further proposed that Shari'ah rulings should have legal certainty in the courts of law.

With this in view, this study will examine how congruent the interaction of *fatāwā*, Shari'ah rulings, resolutions and conventional laws in contemporary Islamic finance is in Malaysia. The objectives of this research are to examine the interaction between *fatāwā*, resolutions, Shari'ah rulings and conventional laws in contemporary Islamic finance in the Malaysian conventional legal framework. Secondly, the objective of this research is to analyse the practices in Saudi Arabia, Pakistan and Sudan as comparative analysis and the lessons to be learned. Another objective is to examine the extent of consistency of current Islamic finance practices in Malaysia in the context of established classical legal frameworks and to propose recommendations to *fatwā*-issuing bodies, Shari'ah advisory bodies, dispute settlement agencies and executive governmental functionaries for better governance of Shari'ah in Malaysia.

The subject matter of this research is *fatāwā*, Shari'ah rulings, resolutions and conventional laws. The research will examine the roles of *fatwā*-issuing bodies, executive governmental functionaries, Shari'ah supervisory bodies and dispute settlement agencies. The relevant property rights laws and the relevant laws regulating Islamic finance, *inter alia* the Contracts Act, Companies Act and Bankruptcy Act, will also be examined. This research shall study how the *fatāwā*, Shari'ah rulings, resolutions and conventional laws interact with each other, what are the problems that they face, and the impact of congruence or incongruence of the interaction. The time frame for

this study is based on the Malaysian Financial Sector Plan (January 2000 - December 2010) and this time frame applies to the studies of the following four countries, Malaysia, Saudi Arabia, Pakistan and Sudan.

SCOPE OF RESEARCH

Indeed, currently there is a scarcity of resources on the interaction between conventional and Shari'ah frameworks in Malaysia and in other countries. There is also no current literature or juristic opinion on the interaction between *fatwā*-issuing bodies, Shari'ah advisory bodies, executive governmental functionaries and dispute settlement agencies under the conventional legal framework. This research aims to help the Malaysian authorities improve the existing legal framework and play a leadership role in contemporary Islamic finance. In studying the Malaysian position, there is also the need to refer to other jurisdictions as benchmarks and for lessons to be learnt in the laws that relate to the Shari'ah framework for Islamic finance—relevant laws like contract law, companies law, taxation law, bankruptcy law—and decided court cases, because the legal framework in Saudi Arabia, Pakistan and the Sudan is fully Shari'ah based.

RESEARCH METHODOLOGY

The methodology for this research is paper analysis of the Shari'ah, where law, finance, economics and business form a single dimension. This study will apply the content analysis method to investigate the interaction between *fatwā*-issuing bodies, executive governmental functionaries and dispute settlement agencies, based on the classical work of Muslim jurists and scholars, as found in the following books, *inter alia al-Ahkām al-Sultāniyyah wa al-Wilāyāt al-Dīniyyah*, by al-Māwardī, *al-Ihkām fī tamyiz al-fatāwā 'an al-Ahkām wa Taṣarrufāt al-Qāḍī wa-al-Imām*, by Aḥmad ibn Idrīs al-Qarāfī, *al-Sulṭāt al-Thalāthah fī al-Dasātīr al-'Arabīyyah al-Ḥadīthah wa fī al-Fikr*

al-Siyāsī al-Islāmī, by Sulaymān Muḥammad al-Tamāwī, *Ma'ālim al-Khilāfah fī al-Fikr al-Siyāsī*, by Khālīd Maḥmūd 'Abdul-Majīd, *Qawā'id Nizām al-Ḥukm fī al-Islām*, by Khālīd Maḥmūd 'Abdul-Majīd and *Ikhtilāf al-Dārayn wa Atharuh fī Aḥkām al-Munākahāt wa al Muāmalāt*, by Isma'īl Luṭfī al-Fattānī.

Therefore, this is a library-based research. The secondary data includes written laws and regulations, Islamic finance *fatāwā*, decided cases, rulings and practice directions, and academic journal articles from online databases including Lexis Nexis, West Law, and the Oxford Journal of Islamic studies. In this respect, the data will be generated and analysed by adopting the comparative analytical method of analysis. Consequently, the data will be transcribed and analysed using the Atlas.ti qualitative data analysis software. The data will be coded into themes. Thereafter, the output will be generated from the programme itself and shown in the network view of Atlas.ti.

CONCLUSION

This study will contribute to the body of knowledge on Islamic finance governance, and will attempt to examine and address the interaction of Islamic finance *fatāwā*, Shari'ah rulings, resolutions and conventional laws within the context of contemporary Islamic finance in Malaysia, and will benefit the *fatwā*-issuing bodies, executive governmental functionaries, Shari'ah supervisory bodies and dispute settlement agencies, particularly in improving Islamic finance governance and property rights claims in Malaysia.

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